

Service Date: June 3, 1986

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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THREE RIVERS TELEPHONE COOPERATIVE,))	
INC. and MONTANA TELEPHONE)	
ASSOCIATION,)	
)	UTILITY DIVISION
Complainants,)	
)	
vs.)	DOCKET NO. 85.8.34
)	
MOUNTAIN STATES TELEPHONE AND)	
TELEGRAPH COMPANY (Mountain Bell),)	ORDER NO. 5188
)	
)	
Defendant.)	

* * * * *

FINAL ORDER

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BACKGROUND

1. On August 2, 1985, Three Rivers Telephone Cooperative, Inc. and the Montana Telephone Association filed a Complaint with the Montana Public Service Commission against Mountain States Telephone and Telegraph Company (hereinafter Mountain Bell). Mountain Bell answered on August 29, 1985. Three Rivers Cooperative and the Montana Telephone Association (hereinafter MTA), filed an amended Complaint on September 9, 1985 which Mountain Bell answered on January 23, 1986, with a motion to dismiss and a brief. Montana Consumer Counsel intervened in this docket. A hearing was noticed for February 13, 1986. The

parties agreed to a stipulation of the facts, the hearing was cancelled and briefs on the legal issues were submitted by both sides. The Montana Public Service Commission (hereinafter MPSC), has not acted on the motion to dismiss.

2. Three Rivers Cooperative, a member of MTA, is a cooperative telephone company providing telephone service in central Montana. MTA is a trade association representing the interests of Montana's small independent telephone companies and rural cooperatives. Mountain Bell, part of U.S West, one of the Seven Bell Regional Holding Companies, is a corporation providing telephone service in seven Rocky Mountain area states including Montana.

3. Both Mountain Bell and Three Rivers Cooperative are local exchange companies (LECs) . LEC is the acronym for a company providing basic local service and providing long distance access to and from to the local exchange network. For example, local business and residential service is provided by a LEC. Any call initiated and terminated on telephones within a LEC's exchange boundary is completed using only the LEC's network, including central office equipment. If the call is placed to an area outside the exchange boundary it moves from the initiating LEC's network to a long distance carrier or carriers to the terminating LEC. The long distance carrier may or may not be the same company as the LEC, depending on where the call is initiated and terminated. Although a few of the larger carriers are better known, nationwide there are hundreds of independent telephone companies providing local service and many carriers providing inter and intra lata long distance service.

4. LEC's service areas are delineated by exchange boundaries filed with and approved by the MPSC. These tariffs determine the rates for local services according to a telephone subscriber's location in the exchange in relation to the exchange's central office. Generally, an exchange has a base rate area and zones. Rates for local services increase from zone to zone. A call terminating outside the exchange is a long distance call. The Commission relies on §§69-3-102 and 103, MCA, for its authority to establish exchange boundaries. Mountain Bell serves throughout the state but its exchanges are not contiguous. Interspersed throughout Montana are the exchanges of Mountain Bell, the rural independent companies, General Telephone of the Northwest, General Telephone, and the co-ops. There is also unassigned territory.

5. Unlike the market for long distance carriers, the local exchange remains relatively uncompetitive. With the technology currently available, local telephone service within an exchange boundary is provided by one LEC; within the exchange boundary there are no competitors also offering local service to the consumer. For example, a Mountain Bell subscriber living in the Helena exchange cannot choose to use a LEC of another carrier for local service. To the MPSC's knowledge there is no place in the country where two LECs serve one exchange.

6. As this complaint shows, the LECs may be beginning to compete for service areas. Mountain Bell appears to be advocating that all telephone consumers should be allowed to select which LEC they use. Allowing this selection in assigned exchange areas is academic at present because there is no area where two LECs offer service. As the MTA points out in its brief, with the technology currently available in Montana, competing LECs would cause costly duplication of equipment and would create patchwork service within communities. The rapid changes in telecommunication technology may change this in the future but this is the situation now. Despite Mountain Bell's efforts to characterize the issue at hand as a question of allowing consumers to choose among competing LECs, it is in fact a question of allowing LECs to compete for service areas. Once a service area is established, local service will be provided on a monopoly basis by one LEC.

FINDINGS, ANALYSIS AND DISCUSSION

7. The following is the parties' stipulation of facts relevant to this complaint. The MPSC adopts these as its findings in this order.

- (1) There exists in rural Cascade County, at a point between Great Falls and Stockett, a developing residential subdivision consisting of eight lots. The subdivision is known as Green Ridge Acres.
- (2) Green Ridge Acres lies predominately within the established boundaries of Three Rivers Cooperative Telephone Cooperative, Inc.'s (hereafter referred to as Three

Rivers Cooperative) Stockett exchange, with the balance of the subdivision lying within the boundary of Mountain Bell's Great Falls exchange.

- (3) In the Fall of 1984, some of the lot owners of Green Ridge Acres requested that Mountain Bell provide them with telephone service. On December 12, 1984, Mr. Don Henderson, who was then Manager of Bell - Independent Relations for Mountain Bell, requested that Three Rivers Cooperative release the Green Ridge Acres area to Mountain Bell. Mr. Eugene Andrus, General Manager of Three Rivers Cooperative, notified Mountain Bell by letter of December 13, 1984, that Three Rivers Cooperative would not release Green Ridge Acres from its Stockett exchange.
- (4) Mountain Bell nonetheless entered a contract with Green Ridge Acres lot owners to provide Mountain Bell service to the area. When Mountain Bell began extending its plant to the area, Three Rivers Cooperative requested that Mountain Bell cease such construction in view of the fact that Three Rivers Cooperative had denied release of the area.
- (5) Mountain Bell declined to terminate construction and is currently providing service at two locations within the Green Ridge Acres subdivision.
- (6) The service being provided to Green Ridge Acres by Mountain Bell does constitute "regulated telecommunications service" as defined in the Montana Telecommunications Act. Therefore such service is subject to regulation by the Montana Public Service Commission.
- (7) Mountain Bell's current provision of service to Green Ridge Acres is contrary to the tariffs governing its service and rates currently on file and approved by the Public Service Commission. Mountain Bell has filed a tariff seeking approval of Extraterritorial Service in situation such as the present one.

Stipulated this 6th day of March, 1986.

8. In their Complaint MTA and Three Rivers Cooperative ask the MPSC to order Mountain Bell to cease all efforts to provide telephone service to Green Ridge Acres and to file a tariff making it absolutely clear that Mountain Bell will endeavor to serve only those areas that are within the boundaries of Commission approved exchange areas. Mountain Bell answers with a motion to dismiss based on lack of jurisdiction by the MPSC over the complainants and the subject matter and lack of jurisdiction to grant the relief requested.

Jurisdiction Over Subject Matter and Complainants

9. Before considering the issue raised in this complaint, the MPSC must address Mountain Bell's challenge of the MPSC's jurisdiction over the MTA and Three Rivers Co-op and over the subject matter of this complaint.

Subject Matter

10. This complaint raises questions of the extent of the MPSC's jurisdiction to establish exchange boundaries. This authority, as stated above in paragraph 4, is derived from the MPSC jurisdiction to set rates and regulate utilities. Based on its rate making and regulatory jurisdiction the MPSC has jurisdiction to consider the subject matter of this complaint, Mountain Bell does not appear to challenge the exchange boundary rate setting process and has accepted the MPSC jurisdiction over exchange boundaries many times in the past.

Jurisdiction Over Complainants

11. The MPSC is well aware of the point reiterated in Mountain Bell's brief that it does not regulate cooperative telephone associations; resolution of the issue in this case, however, does not involve regulation of the Co-ops. The MPSC does regulate four independent telephone companies that are members of the MTA. Although Mountain Bell characterizes its challenge as a question of the MPSC's jurisdiction, it appears to challenge MTA's and Three

River Cooperative's standing to bring this complaint. Section 69-3-321(1), MCA, states: "The commission shall proceed, ... upon a complaint made against a public utility by any ... person, firm or corporation, directly affected thereby." This complaint raises two issues of concern to all regulated Montana telephone companies and their customers: 1) May a regulated telephone company offer service outside of its approved exchange boundaries without MPSC approved tariffs? 2) Does the MPSC have the authority to prescribe the area in Montana where the regulated telephone companies serve? The MTA, with its regulated members, and Three River Cooperative as customer of regulated companies have the standing to raise these issues.

Jurisdiction to Provide the Relief Requested

12. As stated above, this complaint raises two questions:
 - 1) May a regulated telephone company offer service outside of its approved exchange boundaries without MPSC approved tariffs?
 - 2) Does the MPSC have the authority to prescribe the area in Montana where the regulated telephone companies serve?

The answer to the first question is clearly no, Section 69-3-301, MCA, states:

. . . .Every public utility shall file with the commission, within a time fixed by the commission, schedules which shall be open to public inspection, showing all rates, tolls and charges which it has established and which are in force by it within the state or for any service in connection therewith or performed by any public utility controlled or operated by it, Every public utility shall file with and as a part of such schedule all rules that in any manner affect the rates charged or to be charged for any service.

And §69-3-305(1), MCA, states: "It shall be unlawful for any public utility to ... demand, collect, or receive any rate, toll, or charge not specified in such schedules."

13. Mountain Bell served telephone customers outside its exchange boundaries without a tariff approved by this Commission. With no authorized rates to charge these customers, Mountain Bell violated §§ 69-3-301 and 305, MCA. Mountain Bell's briefs repeatedly reiterate Montana's stated policy of encouraging competition in telecommunications as justification for serving outside a tariffed boundary. This Commission agrees that legislative policy is pro competition and this Commission supports that policy. However, basic telephone service offered by a local exchange company is not a deregulated service in Montana; rates are set by this Commission and published in tariffs approved by this Commission. Because of the unique circumstances of this complaint and the legal question on the Commission's authority to prescribe service areas, the MPSC will not seek penalties for provision of services contrary to tariffs. In the future, if such violations occur the MPSC will seek the penalty prescribed in 69-3-206, MCA.

14. The second question is whether the MPSC has the authority to prescribe the area in Montana that a regulated telephone company may serve? Or, in other words, if Mountain Bell had attempted to file a tariff with the MPSC, could the MPSC deny it permission to expand its exchange boundary into an area served by another LEC? Mountain Bell argues that because Montana law provides neither a territorial integrity act nor a certification process for telecommunication utilities the MPSC does not have the statutory authority to prescribe service areas for regulated companies. MTA and Three Rivers Cooperative agree that there is no territorial integrity or certification process in Montana but maintain that the Commission's authority to set exchange boundaries and its general authority to regulate utilities give it the authority to resolve this complaint by directing Mountain Bell to cease service in Green River Acres and requiring it to serve only those areas within the boundaries of Commission approved exchange areas. MTA and Three Rivers argue that if the MPSC does not establish service areas it will fail to supervise public utilities as required by §69-3-102, MCA, and will be allowing patchwork local service and costly duplication of facilities.

15. To understand the impact of this complaint on telephone service in Montana it is necessary to briefly review some of the history of that service. Along with Mountain Bell, co-operatives and other independent telephone companies have long existed throughout Montana. These companies provide local service in their service areas and, in some cases, long distance

service. In the past, prior to divestiture, these companies, including Mountain Bell, would informally agree about what territory each company would serve.

16. In its Answer to this complaint Mountain Bell denies that such territorial agreements ever existed, appearing to assert that because it now considers such agreements contrary to the public interest it would have never entered into the agreements in the past. But, based on prior PSC decisions and prior tariff filings (see for example, Stuft v. Mountain State Telephone And Telegraph, Order No. 4673, paragraph 8, (1980),) it is a matter of administrative record that these agreement did exist.

17. The MPSC has no authority or desire to question Mountain Bell's decision to cease making informal territorial agreements. The MPSC is well aware that the divestiture of AT&T changes how telephone service may and will be offered, However, Mountain Bell's attempt to confuse the issue by arguing that in the past a telephone company offered service wherever it pleased without any agreement and that Mountain Bell is now merely trying to continue the status quo is rejected, In the past telephone utilities established service areas by informal agreement among themselves. Because this informal process no longer exists the MPSC is faced with the question of whether it has the authority to establish service areas.

18. Because Montana law does not require certification and there is no Territorial Integrity Act for telecommunication utilities the MPSC must agree with Mountain Bell that it does not have the statutory authority to prohibit a regulated telecommunication utility from offering service in any area. In Intermountain Telephone and Power Company v. Department of Public Service Regulation, 651 P.2d 1015, 201 Mont. 74, 77 (1982) the Montana Supreme Court stated:

Montana has no statute providing for the licensing, franchising or certifying of telephone companies wherein those companies are granted an exclusive right to serve a certain area. There is also no exclusive property right under the Territorial Integrity Act of 1971, as that Act applies to suppliers of electrical service, not telephone service. Section 69-5-103, MCA.

Telephone service competition is basically free and open in Montana, except so far as telephone cooperative are concerned. Section 35-18-105(2), MCA, prohibits telephone cooperatives from duplication 'reasonably adequate service' already in existence.

19. Many states have seen the need for a telecommunication utility certification process or telecommunication territorial integrity to avoid costly duplication of facilities and patchwork service. The need for territorial integrity or certification may be particularly great in rural states such as Montana where the smaller companies may be vulnerable to losing their more densely populated, profitable areas and being left to serve only the sparsely populated, less profitable areas. However, without statutory authority delegated by the Legislature, the MPSC cannot prescribe where a regulated telecommunication utility may offer new service. However, once service is offered in an area, the MPSC has authority to require that service be continued.

CONCLUSIONS OF LAW

1. The Montana Telephone Association and Three Rivers Cooperative have standing to bring this complaint.

2. The MPSC has jurisdiction over the subject matter of this complaint.

3. The Montana Public Service Commission does not have the statutory authority to provide the relief sought. It cannot order Mountain Bell to serve only those areas that are within the boundaries of currently approved exchange areas. If a regulated telecommunication company wishes to serve an area outside its approved boundaries it must file new tariffs with this Commission but this Commission does not have the authority to deny those tariffs on the basis of prescribed service areas.

ORDER

THE MONTANA PUBLIC SERVICE COMMISSION ORDERS THAT:

1. The Complaint that is the subject of this docket is hereby dismissed.

Done and dated this 2nd day of June, 1986 by a vote of 3-2.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

CLYDE JARVIS, Chairman

JOHN B. DRISCOLL, Commissioner

HOWARD L. ELLIS, Commissioner

TOM MONAHAN, Commissioner
Dissenting

DANNY OBERG, Commissioner
Dissenting

ATTEST:

Trenna Scoffield
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision.
A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.

DISSENTING OPINION

Divestiture has created a new world of telephone service in Montana. Competition has been interjected in the industry which has disturbed the traditional method in which companies like Mountain Bell and the members of the Montana Telephone Association conduct their business. There has never been a certification or franchise system outlining specific service areas in Montana. However, both Commission past practice of approving boundary areas and the time honored “gentleman’s agreement” between Mountain Bell and the rural telephone companies defining service areas established clear service boundaries in practice if not in fact.

Divestiture did not create a competitive phone market but rather has only set the stage for the development of such a situation. In the meantime both the Modified Final Judgment and FCC decisions recognize the need for regulators to retain oversight and control of telephone service and providers to guard the public interest until the market develops to the point where such action is not needed.

In this instance I believe a more guarded and cautious approach by the Commission would have been appropriate. Until we are more convinced of the financial viability of rural telephone companies, I believe the Commission should have preserved its full right to review service boundaries to test proposed revisions according to public interest criteria, I, therefore, believe the complaint of Three Rivers Telephone Cooperative, Inc. is proper and the relief they sought an appropriate decision.

Danny Oberg, Commissioner